



M'anampiu (Suing as the Legal Representative of the Estate of Kanampiu Mutuera - Deceased) v Director Land Adjudication and Settlement & 4 others (Environment and Land Appeal E046 of 2023) [2024] KEELC 5560 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E046 OF 2023**

**CK NZILI, J
JULY 24, 2024**

BETWEEN

KINYA M'ANAMPIU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KANAMPIU MUTUERA - DECEASED) APPELLANT

AND

THE DIRECTOR LAND ADJUDICATION AND SETTLEMENT 1ST RESPONDENT

THE LAND REGISTRAR, MERU 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

FRANCIS MUGIRA KAINI 4TH RESPONDENT

SILVANA MUTHAMIA 5TH RESPONDENT

(Being an appeal from the Judgment of Hon. S.K Ngetich – SPM in Nkubu SPM ELC No. 151 of 2018 delivered on 8.11.2023)

JUDGMENT

1. The appellant, as the plaintiff, sued the respondents as the defendants through a plaint dated 21.8.2019, for issuing him a title deed for L.R No. Abogeta/Upper-Kiungone/498 measuring 3.26 acres instead of 7.40 acres, initially acquired by his late father during the gathering and the demarcation process and contrary to what he was occupying on the ground.
2. The appellant termed the acts of the 1st – 3rd respondents in failing to record the entire acreage of the land initially recorded as L.R No. Abogeta/U-Kiungone/1385 in the name of Muthamia Ntaari and currently L.R No. Abogeta/U-Kiungone/1985 into the name of his neighbors, the 4th & 5th



respondents, respectively, and the subsequent issuance of title deeds in their favor as illegal, irregular and fraudulent. He sought for:

- a. Rectification of the register to reflect 8.07 acres and register it in the names of the deceased's estate.
 - b. The land register to pinpoint on the ground where the 8.07 acres are.
 - c. Compensation for the missing 4.81 acres
 - d. Vacant possession by the 5th respondent from the said land.
 - e. Declaration that the respondent's actions were illegal and unlawful.
3. The 1st – 3rd respondents opposed the suit by a statement of defense dated 9.5.2019, terming the claim as time-barred since it was being filed 50 years after the title deeds were issued in 1977; that the appellant knew about the errors but failed to contest them for 40 years; that by operation of law, the appellant had waived his rights to the current owners; for not inspecting the adjudication register to ascertain its correctness before registration despite notice to inspect the register given to him; that under the doctrine of adverse possession, he could not recover the land after 12 years; that the suit was a non-starter, incompetent, brought by an indolent and negligent person, who was not deserving of the reliefs sought since the court had no jurisdiction upon completion of adjudication and issuance of the title deed.
 4. In reply to the defense dated 16.5.2019, the appellant denied the contents of the 1st-3rd respondents' statement of defense. He stated that he became aware of the mistake during the probate cause of his father's estate: that he had been denied his constitutional rights to property, his claim was not time-barred, inordinately brought, or invalid; that he was a minor when the adjudication register was published and hence denied he was not negligent or indolent.
 5. The 4th & 5th respondents opposed the claim through a statement of defense dated 20.9.2019. It was averred that L.R No. Abogeta/Upper Kiungone/498 measured 3.0 ha and not 3.26 ha, which registration superseded any recordings under the [Land Consolidation Act](#) (Cap 283) and [Land Adjudication Act](#) (Cap 284) and hence was an indefeasible title.
 6. As to L.R No. Abogeta/Upper-Kiungone/495 and 1385, the 4th & 5th respondents termed them as the first registration whose acreage was 0.28 ha and 1.4 ha in size, contrary to the alleged missing 4.81 acres. The 4th & 5th respondents averred that they were occupying L.R No. 1385 and not L.R No. 498. They denied the alleged fraud or illegality terming the suit as brought by a person lacking letters of administration to institute or maintain it for the estate of Kanampiu Mutuera and based on a statute-barred claim. The 4th & 5th respondents also relied on a preliminary objection dated 19.6.2020.
 7. In reply to the 4th and 5th respondents' statement of defense, dated 12.11.2019, the appellant averred that he had sought and obtained letters of administration to institute the suit and termed the defense as frivolous, based on evidence and not facts.
 8. At the trial, Robert Kinyua Kanampiu testified as PW 1 and relied on his witness and supplementary statements dated 10.9.2019 and filed on 10.9.2019 as his evidence in chief. He told the trial court that he was a son of the late Kanampiu Mutuera, the registered owner of L.R No. Abogeta/U-Kiungone/498, which he gathered and recorded as his at adjudication process, measuring 8.07 acres but registered as 7.40 acres as per the land register.
 9. PW 1 said that the suit land on the ground, was measuring 3.26 acres with an unexplained variance to the legal beneficiaries, hence the need to rectify it. He produced the limited grant dated 4.10.2018,



a copy of the register for L.R. No. 498 and 1385 Demarcation Sheets No. 100 and 101. Further, he said that his father's land was subject to a cut of 0.33 acres, he acquired 0.75 acres as per the books afore stated.

10. PW 1 also said that the 4th respondent's land was adjacent, namely Parcel L.R. No. 495, which was transferred 4 acres to Form Folio No. 1385, as parcel L.R. No. 149, leaving 77 points. PW 1 said that the 5th respondent illegally and unlawfully occupied his late father's land after her husband fraudulently allegedly obtained a title deed for L.R. No. Abogeta U-Kiungone/1385 measuring on the ground 4.8 acres. PW 1 said that this late father's land was reduced by 3.26 acres on the ground despite the title deed indicating 7.40 acres. He produced the documents in the two lists dated 19.12.2019 and 28.8.2019 as P. Exh No. 1-9, respectively.
11. In cross-examination, PW 1 acknowledged that the title deed for the suit parcel of land was issued on 2.2.1970, but collected in 1977. PW 1 said that he was privy to the requirements to view the adjudication register, which his late father was not aware of out of illiteracy; hence, he appended his signature, though he was doubtful whether his father signed the adjudication register. PW 1 said that the 4th & 5th respondents were land adjudication committee members coming from the locality of the suit land. He said that had his father become aware of the anomalies, he would have lodged complaints. PW 1 said that the problem arose during the registration stage though he had no final adjudication register before court. Nevertheless, he said the fraud may have also happened at the adjudication stage. He said that he established the fraud while filing the probate cause.
12. Cross-examined by the 4th & 5th respondents, PW 1 said that the land adjudication process took place in 1964 while he was born in 1969, as per his identity card. PW 1 said that they have lived on the land since he was born. He was unable to verify if his late father sued the 4th & 5th respondents during his lifetime over the fraud. He said that he had obtained a land surveyor's report, though not produced in court, confirming the anomalies. PW1 claimed that the fraud occurred in 1970 but learned about it late from the deceased father and during the process of filing for letters of administration; otherwise, his claim was not out of greed or malice.
13. After compliance with the law following the transfer of the presiding court, Francis Muregi M'Kiaru testified as DW 1 and adopted his witness statement dated 8.10.2019 as his evidence in chief. He termed the appellant as a family member. DW1 told the court that he gathered his land of 5 acres in 1960, and after a percentage cut, he remained with $4\frac{3}{4}$ acres, sold 4 acres to the husband of the 5th respondent, and remained with $\frac{3}{4}$ of an acre that was registered as L.R. No. Abogeta/U-Kiungone/495 while the 5th respondent retained L.R. No. Abogeta/U-Kiungone/1385, where they had been occupying. D.W. 1 said that the deceased father to the appellant died an older adult with no pending claim against them.
14. Further, DW 1 said that the ground size was equal to what was referred to in the register. He produced the registers for L.R. No. 498, 495, and 1385 as D. Exh No. 1 (a), (b) & (c). He said that he sold the land to the 5th respondent before the adjudication process was over and eventually obtained the title deed.
15. DW 2 was Silvana Muthamia. Relying on a witness statement dated 8.10.2019, she associated her testimony with that of DW 1 and the exhibits produced. She termed the claim as time-barred, malicious, given her occupation and registration were lawful. In cross-examination, DW 2 said that it was her late husband who bought the 4 acres and took vacant possession, though she had no sale agreement to that effect, following which the land was demarcated & registered.
16. The appellant faults the trial court by a memorandum of appeal dated 22.11.2023 for:
 - i. Dismissing his suit.



- ii. Finding that he was seeking to reopen the adjudication process.
 - iii. Being statute barred
 - iv. Holding it was not based on the final adjudication record listed on registry index maps.
 - v. Not establishing the variance of 3.26 acres.
 - vi. Disregarding his evidence.
 - vii. For finding that the 1st – 3rd respondents had not controverted his evidence.
17. With leave, parties were directed to canvass the appeal by written submissions due by 19.7.2024.
 18. The 4th & 5th respondents filed submissions dated 15.7.2024 and isolated issues for determination. On whether the suit was right before the trial court, they submitted that the appellant had other avenues to resolve the dispute which he chose not to thus the suit ought to have been dismissed with costs. reliance was placed on Sections 20, 21, 25, 26, 26A, 27, 28 & 29 of Cap 284 and Ogutu vs Makanda ELCA E016 of 2023 (2024) KEELC 1337 (KLR).
 19. Regarding the burden of proof, the 4th & 5th respondents submitted that the appellant failed to adduce any evidence of the adjudication titleage and acreage to find fraud. They relied on Black's Law Dictionary, 9th Edition, Tatil Patel vs Lalji Makanji E.A 1957, Gudka vs Dodhla Civil Appeal No. 21 of 1980, Mutiria Karumbai Macaw vs James Njagi Makembo & 3 others (2018) eKLR.
 20. On the merits of the appeal, the 4th & 5th respondents submitted that in light of the evidence produced, the same lacks merits and then the costs should follow events.
 21. Having reviewed the lower court record, the issues calling for my determination are:
 - a. If the suit brought by the appellant was statute-barred.
 - b. If the appellant pleaded and proved the particulars of fraud and illegality against the respondents.
 - c. If the appeal has merits.
 - d. What is the order as to costs?
 22. It is trite law that parties are bound by their pleading and issues arising out of the said pleadings. See Raila Amollo Odinga and others vs IEBC (2017) eKLR.
 23. In this appeal, the appellant's claim was based on fraud and illegality alleged to have occurred during the demarcation registration and issuance of the title deeds in favor of the 4th & 5th respondents. The 1st – 3rd respondents pleaded that the title deeds for the suit land were issued in 1977, following the completion of the adjudication process. PW 1, in his cross-examination, admitted that the adjudication process was completed in 1964. He claimed that the alleged fraud occurred in 1970. Copies of green cards produced by the 4th & 5th respondents indicated that title registers for L.R No. Abogeta/Upper Kiungone/498, 495, and 1385 were opened on 2.2.1970, and the title deeds were issued to the holders on 15.2.1977, 31.5.1972, and 23.1.1975 respectively.
 24. The late Kanampiu Mutuera signed the register to collect his title deed on 15.2.1977. The appellant relied on demarcation Sheets No. 100 and 101, as a basis that there was a variance between the acreage at the adjudication stage vis a vis what was in the title deed. P. Exh No's. 8 & (9) had no certification from the land adjudication office. They were not accompanied by a certified copy of the adjudication



- registers that were forwarded to the titling center for registration and the eventual issuance of the title deed. The appellant was unable to verify whether his late father attended a meeting after the adjudication register was published to verify the size and the names in it during the window granted by law after the publication of the register.
25. Other than relying on an unverified demarcation book, the appellant failed to call for and avail before the trial court any original or duplicate copy of the adjudication register that was sent to the chief land register, different from the published register, hence omitting part of his land in favor of the 4th & 5th respondents. Similarly, the appellant failed to bring before the trial court evidence to establish that what was removed from his adjudication register ended up being recorded and registered in favor of the 4th and 5th respondents.
 26. The appellant also failed to call for the land adjudication and demarcation records to show that the demarcated land that the survey work had initially plotted was equivalent to 7.40 acres during the demarcation process and was not 3.26 acres.
 27. It is trite law that when a root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership without going beyond the instrument and proving the legality of who acquired the title and showing that the acquisition was legal, formal and free of any encumbrances. See *Munyu Maina vs Hiram Gathiba Maina Court of Appeal Civil Appeal No. 239 of 2009*. In *Nkarichia vs Magiri and others E & L Case E004 of 2021 (2024) (Judgment)*, the court cited *Gatirau Peter Munya vs Dickson Mwenda Kithinji & others (2014) eKLR*, on the proposition that a person who makes an allegation must lead evidence to prove the fact or the existence or non-existence of a fact in issue.
 28. Evidence of the issuance of title deed to the appellant's father in 1977 is not disputed. It is the appellant who wanted for the trial court to believe that he discovered the fraud or illegality after his father passed on. It was the appellant who wanted the trial court to find that fraud or illegality was attributed to the 1st, 2nd, and 3rd respondents in collision with the 4th & 5th respondents.
 29. A claim based on fraud must be filed within three years. Claim for recovery of land must also be lodged before the expiry of 12 years under Section 7 of the Limitation of Actions (Cap 22). From 1977, when the appellant's father was issued with a title deed, he must have known the acreage of his land as per the title deed. On the ground, he must have known that what was under his occupation was less compared to what was adjudicated to him during the land adjudication process.
 30. The 4th & 5th respondents, in their statement of defense and evidence, were categorical that they have been in occupation of the suit land as per the acreage on their title deeds and that at no time did the appellant's late father complain about encroachment or boundary dispute. So, the burden was on the appellant to prove that had he used due diligence, he would not have discovered the discrepancies on the title deed and on the ground unto the death of his late father.
 31. In *Nkarichia vs Magiri (supra)*, the court said that the law of limitation of action is intended to protect defendants against unreasonable delay in bringing a suit against them. The court said that the intended plaintiff is expected to exercise reasonable diligence and to take reasonable steps in his interest, as held in *Gathoni vs Kenya Cooperative Creameries Ltd (1982) KLR 104* and *Iga vs. Makerere University (1972) E.A.*
 32. Section 7 of Cap 22 provides that a suit for recovery of land after the end of 12 years on which a right accrued may not be brought. The onus was on the appellant to come within the provisions of section 26 of the law of the *Limitation of Actions Act* to show what impediments stopped him from discovering the fraud or illegality for close to 40-50 years, since the issuance of the title deed and occupation of the suit parcels of land by the 4th & 5th respondents.



33. A cause of action is an act on the part of the defendant that gives rise to the plaintiff a cause of complaint as held in *D.T Dobie & Co. Ltd vs Joseph Mbuira Machira Civil Appeal No. 37 of 1998*. There is no doubt that the 1st respondent forwarded the completed adjudication registers to the chief land registrar for the opening of the title registers on 2.2.1970 and issuance of title deeds followed in 1971, 1972, and 1977 for L.R No's 498, 495 & 1385.
34. The appellant did not plead any disability on the part of his late father that made him incapable of reading, knowing, or being unavailable when the adjudication register was declared final for all intents and purposes, during the publication of the adjudications register or at the issuance of the title deed. There was no evidence of complaints about the title errors or discrepancy in acreage, particularly between 1970 and the death of the appellant's late father. Announcements through various available mediums generally precede the issuance of title deeds.
35. In *Ogaga vs Ogaga & others Civil Appeal No. 45 of 2018 (2022) KECA 14229 (KLR) (16th December 2022)*, the court held it was disingenuous of the appellant to file a claim 30 years alleging fraud. The court termed the appellant's claim as deceitful or mischievous. The court said a party aggrieved by a decision by a land adjudication officer must file a minister's appeal and that absence of compliance with the internal mechanisms under Cap 284, the appellant could not file a suit after 30 years, seeking the reversal of an adjudication officer's decision. On fraud, the court said that since the respondent's names were inserted in the register on 12.11.1986, time for limitation on account of fraud began to run after the discovery of the fraud as held in *Kenya Ports Authority vs Timberland (K) Ltd (2017) eKLR*.
36. In this appeal, I find the claim on fraud was time-barred on account of Sections 4, 7 & 26 of the *Limitation of Actions Act*, for it was challenging the registration of titles after close to 54 years. I find it inconceivable that for 54 years, the appellant and his late father were unaware that the land they were occupying was not 3.26 acres.
37. Due diligence entails the exercise of care, it requires of a reasonable title holder or occupier of the land who should be careful to know who his neighbors are and the boundaries of his land, and discover any attempt to alter the boundaries and the security of his title documents. In this appeal, it is either the appellant and his late father were careless or inactive, or that the alleged discovery of fraud or illegality by the appellant was an afterthought. See *Paragon Finance PLC vs DB Thakerar & Co. (1999) 1 ALL ER 400*.
38. The next issue is proof of fraud. Fraud or illegality cannot be inferred or assumed. It has to be proved through tangible and cogent evidence on a balance higher than in an ordinary suit. See *Vijay Morjaria vs Nansingh Madhusing Darbar (2000) eKLR* and *Arthi Highway Developers vs West End Butchery Ltd (2015) eKLR*. In *Chief Land Registrar & others vs Nathan Tirop Koech & others (2018) eKLR*, the court observed that all acts done by public officials in the course of their ordinary duties are presumed legally undertaken unless there was rebuttal evidence to the contrary.
39. In *Teresiah Kamene King'oo vs Harun Edward Mwangi (2019) eKLR*, the court captured the doctrine of regularity or legality "omnia preasumuntur rite esse acta". The onus was on the appellant to bring evidence to show irregularities, illegalities, procedural anomalies and unlawful conduct on the part of the 1st – 3rd respondents. The appellant failed to specify the time, day, nature, persons and manner in which the 1st – 3rd respondents falsified, tampered with and interfered with the official land adjudication records to reduce the size of his land and transfer the same to the 4th & 5th respondents. No forensic investigative report was availed showing culpability on the part of the 1st – 3rd respondents acting in cohort with the 4th & 5th respondents.



40. Evidence of the adjudication register after inspection of the published register showing 7.40 acres instead of 3.26 acres was dully thumb printed by the deceased father would have assisted the trial court in making a finding of tampering with the documents at the chief land registrar's office. Nothing linked the 1st – 3rd respondents with any fraud or illegality.
41. In *Amarnath Gupta vs Kazungu & others (2023) KECA 1280 (KLR)*, the court said that a party cannot reopen an adjudication process other than through the process provided for under Cap 283 & 284. The appellant had an option of objecting to the adjudication register or filing a minister's appeal within the statutory period provided under Cap 283 and 284.
42. A party who has failed to exhaust such a mechanism may not turn around to reopen the adjudication process in the name of fraud or illegality. The appellant blames illiteracy or lack of knowledge on the part of his deceased father. Ignorance of the law is no defense. Playing ignorance for 54 years was too much. It bordered on the waiver of rights to the land. This court cannot be sympathetic to such conduct or indolence. The appellant's father slept on his rights for far too long. The delay of 54 years was inordinate and inexplicable.
43. Perhaps it could be true that the appellant and his late father may not have known the law but would have known, as a matter of fact, that the fenced land was less than what was initially adjudicated to them in 1965. In *Royal Media Services Ltd vs Valentine Mugure & another (2019) eKLR*, the court observed that where a disability is raised, the court must consider all the circumstances of the case. The law abhors stale claims and indolence.
44. The upshot is that I find no basis to disturb the lower court judgment. It is as a result of this affirmed. The appeal is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Appellant

Gikunda for 4th & 5th respondent

Muthomi for the appellant

HON. C K NZILI

JUDGE

